
IN THE SUPREME COURT OF MISSOURI

CARL GREER,
Appellant and Cross-Respondent,

vs.

SYSCO FOOD SERVICES OF ST. LOUIS, LLC,
Respondent and Cross-Appellant,

and

THE TREASURER OF MISSOURI as
CUSTODIAN OF THE SECOND INJURY FUND,
Respondent.

On Appeal from the Labor and Industrial Relations Commission
Injury No. 06-013976

SUBSTITUTE OPENING BRIEF OF THE APPELLANT

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Preliminary Statement

Carl Greer was injured in a workplace accident in February 2006 while working for his longtime employer, Sysco Food Systems. A coworker crashed into the forklift on which Mr. Greer was riding, causing a severe crush injury to Mr. Greer's left foot.

Mr. Greer filed a claim for worker's compensation, alleging he was entitled to permanent and total disability ("PTD") benefits against either Sysco or Missouri's Second Injury Fund ("SIF") because, as a result of his injuries either from that accident or, combined with those from some prior workplace accident injuries, he was unable to obtain and maintain employment in the open labor market.

Mr. Greer obtained a great deal of medical treatment for his left foot. His doctors state that, due to the severity of his injuries, he will require a great deal more in the future. Prior to the 2006 injury, Mr. Greer injured his cervical and lumbar spine and right shoulder. These other injuries also are a hindrance and obstacle to his ability to obtain and maintain employment in the open labor market. Nonetheless, the Labor and Industrial Relations Commission denied Mr. Greer's claim for PTD benefits against either Sysco or the SIF.

This was error. The overwhelming weight of the substantial and competent evidence below was that Mr. Greer is entitled to PTD benefits. Testimony of the sole vocational expert who met with and observed him, especially combined with the medical evidence and testimony, showed Mr. Greer is permanently and totally disabled.

This Court should reverse the Commission's judgment that denied Mr. Greer the award of PTD benefits to which the law of Missouri entitles him.

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Jurisdictional Statement

This is an appeal from a judgment of the Labor and Industrial Relations Commission determining an injured worker's benefits.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. The appellant timely appealed to the Missouri Court of Appeals, Eastern District. This case arose in St. Louis County. Under § 477.050, R.S.Mo., venue lay within that district of the Court of Appeals.

On November 18, 2014, the Court of Appeals issued an opinion affirming the Commission's judgment in part and reversing it in part. The appellant filed a timely motion for rehearing and application for transfer in the Court of Appeals. On January 6, 2015, the Court of Appeals denied rehearing but granted the application for transfer and transferred the appeal to this Court under Rule 83.02.

Therefore, under Mo. Const. art. V, § 10, which gives the Court of Appeals authority to transfer "cases pending" there to this Court "by order of the majority of the judges of the participating district of the court of appeals, after opinion," this Court has jurisdiction.

Statement of Facts

A. Carl Greer's Background and Previous Injuries

After Appellant and Cross-Respondent Carl Greer graduated from high school, he had no further formal education (Transcript 16-18). Instead, he held unskilled jobs that did not require any education or training (Tr. 18-20). At the time, no injuries affected his ability to meet any job's physical demands (Tr. 18-20).

Mr. Greer first worked for Respondent and Cross-Appellant Sysco Food Services ("Employer") as an order puller and filler but quickly was promoted to forklift operator, a job he held until the injury that led to this case (Tr. 20-21). The position involved him standing between eight and twelve hours each day, climbing in and out of a forklift, and maneuvering the forklift (Tr. 20-21, 24). He repetitively lifted between ten and 100 pounds, had to push, pull, reach overhead, stoop, squat, and use his neck and upper body throughout the day (Tr. 22-24). Mr. Greer loved his job and was proud of his ability to support his family, and he planned on working for Employer until retirement (Tr. 25-27).

Mr. Greer's first workplace injury was to his neck in 1993 when he fell off of a picker (Tr. 28-29). He underwent therapy and injections, and an MRI revealed bulging discs (Tr. 29). The injury caused radiating pain, beginning a lifelong battle with headaches and pain for Mr. Greer that made him miss work and take frequent breaks (Tr. 29-32). It was harder to stoop, squat, operate a forklift, lift items, or reach overhead (Tr. 31-32). He testified the injury was a hindrance and obstacle to his employment (Tr. 33).

In 1995, Mr. Greer then injured his back while lifting, a task the 1993 cervical injury already made difficult (Tr. 33-34). He treated it with therapy, but the injury and its

radiating pain slowed him down and made it harder to stand, walk, reach, and climb in and out of a forklift, and he needed to stop and rest frequently during the day (Tr. 34-36). He testified this injury was a hindrance and obstacle to his employment (Tr. 35-36).

Lastly, in 2003, Mr. Greer injured his right shoulder, which was his dominant shoulder, and underwent surgery (Tr. 37). This injury made it harder for him to lift, reach overhead, and drive a forklift (Tr. 37-38). Pain made performing his job more difficult: he worked slower and no longer could meet his job's lifting requirements without colleagues' help (Tr. 38-40).

B. The 2006 Crush Injury

On February 23, 2006, Mr. Greer was working in Employer's freezer when his left foot was pinned between two forklifts (Tr. 43-44). His vehicle was stationary, and he was scanning a pallet (Tr. 45, 50). The driver who hit Mr. Greer neither announced his presence nor sounded a horn to indicate he was moving (Tr. 52). As well, Mr. Greer was leaning forward because his scanning gun had malfunctioned (Tr. 46-48).

Mr. Greer was rushed to the emergency room, where he first met Dr. Blair, who he saw for follow-ups through August 2006 (Tr. 56-59). Mr. Greer tried returning to work but was unable to perform his job due to pain and an inability to stand (Tr. 57-58). Employer provided him additional treatment through April 2007, when he again tried to work but still could not meet his job's physical requirements (Tr. 58-61). He asked Employer for more treatment, but Employer refused (Tr. 58-62). As a result, he left his job due to his inability to meet the physical demands of his work (Tr. 61-62).

Thereafter, Mr. Greer sought treatment on his own (Tr. 61-62). He received injections at the Foot and Ankle Center and also had pain management and diagnostic tests (Tr. 62-64). He also received therapy at Forest Park Hospital and was referred to Dr. Jeffrey Johnson at Washington University (Tr. 62-64).

Initially, Dr. Johnson tried conservative treatment, but eventually he performed surgery on Mr. Greer in July 2010 (Tr. 63-66). The surgery alleviated some pain and allowed Mr. Greer to place his foot flatter on the ground (Tr. 63-66). Dr. Johnson then recommended Mr. Greer have a tendon transfer and obtain treatment with a pain specialist (Tr. 63-66).

Mr. Green explained that all the treatment he received and all the bills he incurred were for his left foot (Tr. 76-87). He gave a consistent history of pain beginning with the 2006 crush injury (Tr. 76-87). Employer knew of the treatment and his surgery, but never paid any medical bills or Temporary Total Disability (“TTD”) benefits (Tr. 76-87).

Mr. Greer testified he wants additional treatment (Tr. 67). His left foot is deformed and disfigured (Tr. 67-70). He has balance issues and cannot stand for longer than 20 minutes at a time (Tr. 70-71, 91). He wears special shoes and slippers (Tr. 70-71, 91). His poor balance means he cannot return to his old job, as he cannot stoop, lift, stand or drive a forklift (Tr. 71-74). He must elevate his foot during the day and he uses a cane to walk (Tr. 74-75). He cannot work full-time (Tr. 90-91). Prior to applying for Social Security Disability, which he was granted without a hearing and based solely on his medical records, Mr. Greer looked for work and completed numerous job applications, but never received any interviews or job offers (Tr. 13-16, 90-91).

C. Medical and Vocational Evidence

1. Dr. Shawn Berkin

Dr. Berkin examined Mr. Greer three times, additionally reviewing Mr. Greer's medical records concerning both the 2006 crush injury and the preexisting injuries before giving his opinions (Tr. 166-74). The records included an EMG test on February 13, 2007, records for the preexisting herniated disc and the resulting permanent 50-pound lifting restriction imposed by a neurologist, and records for the preexisting back and right shoulder injuries (Tr. 171-76).

After this review, Dr. Berkin diagnosed a crush injury of the left foot, a fracture of the medial malleolus of the ankle, planter fasciitis of the left foot, and tendonitis involving the posterior tibial tendon at the Achilles tendon of the left foot (Tr. 171-76). He determined these conditions were the direct result of the 2006 crush injury, and amounted to permanent partial disability ("PPD") of 30% of Mr. Greer's left ankle (Tr. 171-76).

As for the preexisting injuries, Dr. Berkin said Mr. Greer had suffered a PPD of 35% of the cervical spine, 20% of the lumbar spine, and 35% of the right shoulder (Tr. 178). He said Mr. Greer could not return to work and was permanently and totally disabled, and recommended treatment and restrictions (Tr. 179-80).

After Dr. Berkin's second visit with Mr. Greer, he reviewed additional records, including an MRI of the left foot that showed significant inflammation to the posterior tibial tendon and EMG studies consistent with tarsal tunnel syndrome (Tr. 180-83). He diagnosed left tarsal tunnel syndrome and explained compression of this nerve causes

pain, limited mobility, and limited walking ability (Tr. 183-84, 187-88). Based on this additional information, Dr. Berkin determined Mr. Greer was permanently and totally disabled, and needed treatment with a foot surgeon (Tr. 191-94).

At his third and final visit with Mr. Greer, Dr. Berkin learned Mr. Greer had undergone tarsal tunnel surgery on his left foot, including tarsal tunnel release and neurectomy with transposition of the anterior and posterior branches of the saphenous nerve (Tr. 195-97). Dr. Berkin noted a 17 centimeter scar on the left foot and that Mr. Greer stood with that foot inverted (Tr. 200). He observed Mr. Greer had a slow gait and avoided bearing weight on his left leg (Tr. 200). He also noted a positive Tinel's sign over the tarsal tunnel and a limited range of motion (Tr. 200).

Based on all of this, Dr. Berkin determined Mr. Greer's job was the prevailing factor in both the injury and the 60% PPD Mr. Greer suffers, and that all of Mr. Greer's treatment and bills were reasonable, necessary, and related to his injury (Tr. 189-90, 200-202, 227-40). He testified the primary and preexisting injuries were a hindrance and obstacle to Mr. Greer's employment and a loading factor should be applied (Tr. 202-03, 206).

Dr. Berkin's assessment was that Mr. Greer cannot compete for work in the open labor market, and recommended supportive measures and work restrictions (Tr. 203-05). His determination that Mr. Greer was permanently and totally disabled was based on the combination of Mr. Greer's physical injuries (Tr. 205-06).

2. Stephen Dolan

Mr. Dolan, a vocational rehabilitation counselor, met with Mr. Greer to assess Mr. Greer's employability in the open labor market (Tr. 733). Prior to writing his report, he reviewed Mr. Greer's medical records, obtained Mr. Greer's educational and work history, learned about Mr. Greer's limitations, and conducted vocational testing (Tr. 733-37). Mr. Dolan looks to see for which jobs one is eligible and whether, when competing against multiple job seekers, one is likely to be hired over other applicants for a full-time, 40-hour-per-week job (Tr. 734-36).

Mr. Dolan determined Mr. Greer's walking with a cane and wearing an ankle brace limits him to sedentary work (Tr. 739-41). As Mr. Greer's work history consisted of unskilled or semi-skilled physical labor jobs, he had no transferable skills to a new, sedentary job (Tr. 743-47).

Based on these facts, Mr. Greer's primary and preexisting injuries, his work restrictions and functional limitations, and his circumstances, Mr. Dolan determined Mr. Greer is permanently and totally disabled (Tr. 747-51, 757-59). When asked about Mr. Greer's employability considering the left foot injury alone, Mr. Dolan testified that, as Mr. Greer has to keep his foot elevated for several hours each day, that alone renders him unemployable in the open labor market (Tr. 758-59).

3. Dr. Jeffrey Johnson

Dr. Johnson, a board certified orthopedic surgeon, has subspecialty training in foot and ankle surgery (Tr. 304-08). He first saw Mr. Greer in December 2009 to treat the 2006 crush injury (Tr. 312). Mr. Greer complained of pain in his inner ankle, chronic nighttime pain, numbness and tingling, and an ability to walk only on the edge of the foot (Tr. 313). An exam revealed hypersensitivity in the area of the injury and a fixed deformity that was unable to be corrected manually due to internal damage (Tr. 314-15).

Dr. Johnson was aware of the earlier diagnosis of a crush injury and tarsal tunnel and stated he determined with a reasonable medical certainty that tarsal tunnel can come from trauma such as a crush injury (Tr. 315-17). Based on Mr. Greer's history and his examination, Dr. Johnson diagnosed post-traumatic changes to the nerve on the inner aspect of the ankle and tarsal tunnel, a crush injury to the nerve and mild ankylosis and equinovarus of the left leg (i.e., a fixed deformity) (Tr. 317-18, 330).

The results from Dr. Johnson's physical exam of Mr. Greer corresponded to the history given and injury described (Tr. 312). He ordered an EMG and a consultation for nerve-related pain (Tr. 322). He also ordered tarsal tunnel release and surgery to straighten the foot and reduce pain and deformity (Tr. 322-25).

Dr. Johnson performed the surgery in June 2010 (Tr. 325-26). He observed the posterior tibial tendon was contracted and scarred along the medial aspect of the foot, along with scarring and thickening of the epineurium of the tibial nerve (the lining around the nerve) (Tr. 326-27, 541-43). Dr. Johnson testified Mr. Greer's pain was consistent

with what he saw in the foot (Tr. 326-27, 541-43). Objective findings explained an inability to bring the foot to neutral (Tr. 327-29).

Surgery improved Mr. Greer's foot's positioning but the varus position returned, making Mr. Greer a candidate for a tendon transfer and pain management (Tr. 330-32). Dr. Johnson said Mr. Greer's pain would be long-term and, based on the length of time, the varus position likely would not improve (Tr. 337-38). He said the February 2006 crush injury was the prevailing factor in his diagnosis and treatment (Tr. 340). Nothing asked on cross-examination caused him to alter his opinion that the treatment he provided and procedures performed were due solely to the 2006 crush injury (Tr. 540).

4. Terry Cordray

Terry Cordray, a vocational counselor hired by Respondent Missouri Second Injury Fund ("SIF"), reviewed Mr. Greer's records to form his opinion on Mr. Greer's employability but never met with Mr. Greer (Tr. 2740-46). Still, he opined Mr. Greer had no transferable skills that could translate to a sedentary job (Tr. 2749-50, 2769). Mr. Cordray noted Dr. Berkin's opinion that, based on Mr. Greer's 2006 crush injury, preexisting injuries, and age, Mr. Greer could not work (Tr. 2750). He considered functional limitations, testified Mr. Greer could not perform his past work, and opined that Mr. Greer's use of a cane was a significant vocational barrier (Tr. 2750-51, 2769).

Mr. Cordray explained he prefers meeting with individuals for assessments (Tr. 2767). He said that, had he met Mr. Greer, it would have added hours to the exam, he could have performed vocational testing, and he would have observed Mr. Greer's demeanor, how he communicated, whether he used a cane, and how he presented to

potential employers (Tr. 2764-66). He also could have discussed Mr. Greer's subjective complaints (Tr. 2764). He acknowledged Mr. Dolan had done all these things (Tr. 2764).

Mr. Cordray testified the need to move about and lying down or resting his leg may be barriers to Mr. Greer's employment (Tr. 2771-72). He said that, if he considered Mr. Greer's self-reported restrictions, it might change his opinion (Tr. 2772). Mr. Cordray noted that, if Mr. Greer had to keep his foot elevated during the day he would be unemployable in the open labor market (Tr. 2778).

Mr. Cordray never tried to place Mr. Greer (Tr. 2772-74). Rather, he looked to see if Mr. Greer is capable of doing work but not if Mr. Greer would be hired over other job applicants (Tr. 2771-80). Unlike Mr. Dolan, Mr. Cordray characterized full-time employment as working as little as 32 hours per week (Tr. 2771-80).

5. Dr. Gary Schmidt

Employer hired Dr. Schmidt, an orthopedic surgeon, to examine Mr. Greer in connection with this case; Dr. Schmidt spent only between 30 and 60 minutes with Mr. Greer (Tr. 2316, 2337-40). Dr. Schmidt noted tenderness in the area under Mr. Greer's inside ankle extending down to the inside part of his heel, which was where Dr. Blair had noted swelling and blisters in the initial examination (Tr. 2327, 2358-60, 2362-63).

Dr. Schmidt confirmed the MRI of Mr. Greer's foot revealed a possible tear to the posterior tibial tendon; he also confirmed the EMG study supported a clinical diagnosis of nerve injury or tarsal tunnel, and that the studies were compatible with entrapment neuropathy of the tibial nerve at the level of the medial ankle, tarsal tunnel syndrome and peroneal neuropathy (Tr. 2345, 2349, 236, 2380-81).

Dr. Schmidt performs tarsal tunnel operations, and explained surgery is the right course for that diagnosis (Tr. 2364-66). He opined the cost of that surgery to be between \$2,000 and \$3,000, followed by therapy and time off work (Tr. 2367-68). He agreed that, if Mr. Greer has tarsal tunnel, it would be in the area where he was injured (Tr. 2375-76). Dr. Schmidt opined Mr. Greer has 5% PPD of the left foot at the ankle due to a reduced range of motion (Tr. 2329, 2333, 2463).

After Dr. Schmidt prepared an additional report following a second, 45-minute exam, he was re-deposed (Tr. 2443-93). His opinions remained unchanged, suggesting Mr. Greer sustained merely a “soft tissue injury” in February 2006 (Tr. 2452-56). He testified none of the medical treatment Mr. Greer received after April 2007 was related to the February 2006 work accident (Tr. 2457-61).

Dr. Schmidt testified tarsal tunnel can be caused by trauma (Tr. 2467). He acknowledged his opinion contradicted treating doctors who operated on Mr. Greer and saw damage to Mr. Greer’s foot and tendon (Tr. 2467-69). He admitted he had not read Dr. Johnson’s deposition about nerve damage or scarring and thickening of the tibial nerve (Tr. 2468). He also acknowledged he was not present at Mr. Greer’s surgeries and did not observe what the actual treating doctors saw (Tr. 2469-70).

Dr. Schmidt also admitted Mr. Greer’s foot appeared “abnormal” (Tr. 2472-75). He agreed Dr. Blair, Employer’s treating doctor, diagnosed possible tarsal tunnel secondary to the crush injury (Tr. 2472-75). Finally, he agreed the additional treatment Dr. Johnson recommended was reasonable (Tr. 33-34).

D. Proceedings Below

Mr. Greer filed a claim for worker's compensation benefits against Employer and the SIF on December 4, 2006, and an amended claim on February 8, 2013 (Legal File 6, 17). The matter was heard before an administrative law judge on May 7, 2013 (Tr. 1).

At the hearing, Mr. Greer testified in person (Tr. 12-134). He also offered into evidence deposition testimony of Dr. Berkin, Dr. Johnson, and Mr. Dolan (Tr. 157-805). Additionally, he introduced his medical records consisting of 21 exhibits detailing his medical treatment following the 2006 injury, his preexisting injuries, and bills associated with the treatment for the February 2006 crush injury (Tr. 865-2303). Employer offered the testimony of one of its managers, video surveillance, and certain documents and medical records (Tr. 135-56, 2304-2732). The SIF offered the deposition testimony of Mr. Cordray (Tr. 2733-86).

After the hearing, *inter alia*, the ALJ made the following findings and conclusions:

- Mr. Greer is entitled to \$49,475.14 in past medical expenses;
- Mr. Greer is entitled to future medical care furnished by Employer;
- Mr. Greer is not entitled to any additional TTD benefits;
- Mr. Greer sustained a 27.5% permanent partial disability of his left foot as a result of the 2006 crush injury, but not any permanent and total disability;
- the SIF is liable to Mr. Greer for 40.6275 weeks of PPD benefits; and

- Under § 287.120.51, R.S.Mo., Employer is entitled to a 25% reduction in all benefits awarded to Mr. Greer from it because Mr. Greer's injury was caused by his failure to obey Employer's reasonable safety rule.

(L.F. 24-46; Appendix ("Appx.") A6-28).

Both Mr. Greer and Employer applied to the Labor and Industrial Relations Commission for review of the ALJ's award (L.F. 47, 50).

The Commission modified the award on the issues of TTD benefits, past medical expenses, and the reduction of benefits under § 287.120.5 (L.F. 57-61). It determined Mr. Greer was entitled to additional TTD benefits from the date of his surgery on June 22, 2010, to the date Dr. Johnson released him on February 4, 2011 (L.F. 58-59). The Commission also found Employer was not entitled to a reduction in Mr. Greer's benefits for violation of its safety rule because Mr. Greer had no actual knowledge of the rule at the time of the accident (L.F. 59-61). In all other respects, though, the Commission affirmed the ALJ's award and adopted its findings and conclusions (L.F. 61).

Mr. Greer timely appealed from the Commission's final award to the Missouri Court of Appeals, Eastern District (L.F. 85). Employer timely cross-appealed (L.F. 89).

On November 18, 2014, the Court of Appeals issued an opinion reversing the Commission's award of additional TTD benefits, but affirming the rest of the Commission's award.

Mr. Greer filed a timely Motion for Rehearing and Application for Transfer in the Court of Appeals. On January 6, 2015, the Court of Appeals denied rehearing but ordered the case transferred to this Court.

Point Relied On

The Labor and Industrial Relations Commission erred in denying Mr. Greer permanent and total disability benefits *because* an award of the Commission must be supported by substantial and competent evidence in the context of the whole record, and if the substantial, competent evidence is that a person is permanently and totally disabled the Commission must award him permanent and total disability benefits *in that* the overwhelming weight of all the substantial and competent evidence presented below, including from numerous medical and other experts, was that Mr. Greer is permanently and totally disabled.

Brown v. Treasurer of Mo., 795 S.W.2d 479 (Mo. App. 1990)

Knisley v. Charleswood Corp., 211 S.W.3d 629 (Mo. App. 2007)

Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. banc 1994)

§ 287.020, R.S.Mo.

Argument

The Labor and Industrial Relations Commission erred in denying Mr. Greer permanent and total disability benefits *because* an award of the Commission must be supported by substantial and competent evidence in the context of the whole record, and if the substantial, competent evidence is that a person is permanently and totally disabled the Commission must award him permanent and total disability benefits *in that* the overwhelming weight of all the substantial and competent evidence presented below, including from numerous medical and other experts, was that Mr. Greer is permanently and totally disabled.

Standard of Review

In an appeal from an administrative agency's decision, this Court determines "whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law." *Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 310 (Mo. banc 2009).

The Court "make[s] a 'single determination whether, considering the whole record, there is sufficient competent and substantial evidence to support the award.'" *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 428 (Mo. banc 2009) (citation omitted). It "must look to the whole record in reviewing the [agency's] decision, not merely at that evidence that supports its decision, 'and we no longer view the evidence in the light most favorable to the agency's decision.'" *Lagud v. Kan. City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004) (citation omitted).

* * *

When the substantial and competent evidence in a worker's compensation case is that the employee is permanently and totally disabled as a result of his workplace injury, the law of Missouri is the employee must be awarded PTD benefits. In this case, numerous medical and other experts who personally had examined and treated Mr. Greer testified in detail that he was permanently and totally disabled as a direct result of his workplace crush injury. The only witness who opined Mr. Greer was not permanently and totally disabled never even had met Mr. Greer. Nonetheless, the Commission denied Mr. Greer PTD benefits. Was the Commission's decision against the overwhelming weight of the substantial and competent evidence?

The Commission erred in denying Mr. Greer PTD disability benefits from either Employer or the SIF. The overwhelming substantial and competent evidence below – including all of Mr. Greer's medical records and the testimony of numerous expert witnesses – was that, as a result of his 2006 workplace crush injury, Mr. Greer is unable to compete for, obtain, or maintain a full-time job in the open labor market: he is permanently and totally disabled. His injuries are a hindrance and obstacle to his employment and his ability to maintain that employment in a full-time setting. The only contrary evidence was from a single witness, Mr. Cordray, who never even met with Mr. Greer. As such, the Commission's decision was contrary to the overwhelming weight of the substantial and competent evidence below. This Court should reverse the Commission's denial of PTD benefits to Mr. Greer.

A. The Commission’s denial of PTD benefits is contrary to the overwhelming weight of the substantial and competent evidence.

Under the Worker’s Compensation Law, “total disability” means “inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident.” § 287.020.6, R.S.Mo.

For such “total disability” to be “permanent,” the claimant must prove it is “of indefinite duration in recovery or substantial improvement is not expected.” *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo. App. 1997). The test is his ability to compete in the open labor market: whether, in the ordinary course of business, any employer reasonably would be expected to hire the claimant in his present physical condition. *ABB Power T & D Co. v. Kempker*, 263 S.W.3d 43, 48 (Mo. App. 2007). Essentially, permanent and total disability is an inability to return to any reasonable or normal employment. *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo. App. 1990).

Thus, given the standard of review, if the overwhelming weight of the substantial and competent evidence before the ALJ is that a claimant is permanently and totally disabled, but the ALJ and the Commission deny him PTD benefits, on appeal that decision must be reversed. *See, e.g., Scott v. Treasurer of Mo.*, 417 S.W.3d 381, 387-89 (Mo. App. 2014); *Abt v. Miss. Lime Co.*, 388 S.W.3d 571, 580-82 (Mo. App. 2012); *Highley v. Von Weise Gear*, 247 S.W.3d 52, 55-59 (Mo. App. 2008); *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 177-80 (Mo. App. 2004).

The overwhelming weight of the competent and substantial evidence below, including medical records, expert opinions, and Mr. Greer’s testimony proves

conclusively and undeniably that Mr. Greer is entitled to PTD benefits due to his inability to obtain or maintain employment in an open, competitive labor market. There is no credible contrary evidence in the record to support a finding Mr. Greer is capable of working full-time, 40 hours per week or that he is likely to be hired over other applicants for any job.

The ALJ heard from two vocational experts on the issue of employability: (1) Mr. Greer's expert, Stephen Dolan, who met with, viewed, and tested Mr. Greer, who spoke with Mr. Greer at length about his injuries, pain, and problems, and who determined Mr. Greer was permanently and totally disabled (Tr. 733-37, 739-41, 743-51, 757-59); and (2) the SIF's expert, Terry Cordray, who never met Mr. Greer, who did not determine Mr. Greer's ability to compete with other applicants, and who admitted he would have preferred to meet with Mr. Greer, but still said, with some equivocation, that he determined Mr. Greer was not permanently and totally disabled (Tr. 2740-46, 2749-51, 2764-67, 2769, 2771-80). Nonetheless, the ALJ stated he preferred Mr. Cordray's testimony over Mr. Dolan's (L.F. 43-44).

That makes no sense. Mr. Dolan – and *not* Mr. Cordray – personally observed Mr. Greer to see how he moved and, *as even Mr. Cordray, himself, admitted* (Tr. 2764-66), was better able to assess how Mr. Greer's physical injuries impact his employability.

Much was made at the hearing about videos Employer played (L.F. 115-16). The videos bear nothing on whether Mr. Greer was employable in a competitive labor market and able to maintain full-time, 40-hour-per-week employment. Rather, they are brief snapshots in time showing Mr. Greer performing basic household chores while wearing

the special shoes he needs (L.F. 115-16). Mr. Greer never said he was incapable of walking or performing basic tasks; he testified – and the medical experts and Mr. Dolan agreed – he no longer can stand for eight hours per day, he has balance issues, and he needs assistance when he stands and walks. The videos do not contradict any of the evidence that Mr. Greer is permanently and totally disabled.

Indeed, even Mr. Cordray agreed Mr. Greer's needs to move about or lay down or rest his leg are barriers to his employment (Tr. 2771-72). Tellingly, Mr. Cordray admitted he never considered Mr. Greer's self-reported restrictions, despite the fact he testified that information might change his opinion on Mr. Greer's employability (Tr. 2772). He also admitted he *prefers* to meet with subjects to view how he or she would appear to potential employers, but did not here (Tr. 2764-67).

As such, in choosing Mr. Cordray's testimony over Mr. Dolan's, the ALJ – and then the Commission – overlooked the fact that Mr. Cordray ignored his self-professed best practices by failing to meet with Mr. Greer to view and assess him personally and failing to look at all of Mr. Greer's circumstances. That was in stark contrast to Mr. Dolan, the only vocational expert who met with Mr. Greer personally and considered both the expert opinions and medical records in conjunction with his personal observations and Mr. Greer's self-reported restrictions.

In short, the only evidence that Mr. Greer was *not* permanently and totally disabled was incompetent and unsubstantial. The overwhelming weight of the evidence below was that Mr. Greer was permanently and totally disabled. As a result, the law of Missouri is he is entitled to PTD benefits.

B. Mr. Greer is entitled to PTD benefits from either Employer or the SIF.

An employee who is permanently and totally disabled is *entitled* to PTD benefits. “Compensation for permanent total disability *shall* be paid during the continuance of such disability for the lifetime of the employee” § 287.200.1, R.S.Mo. (emphasis added).

As the overwhelming evidence in this case is that Mr. Greer is permanently and totally disabled as a result of his 2006 crush injury, he is entitled to these benefits. Either Employer or, failing that, the SIF, is liable to Mr. Greer for those benefits.

1. Employer is liable for Mr. Greer’s PTD benefits.

Generally, under the Worker’s Compensation Law, it is the employer who is liable for any applicable benefits to its employee. “Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury ... of the employee by accident ... arising out of and in the course of the employee’s employment.” § 287.120, R.S.Mo. Thus, if an employee is permanently and totally disabled from his last workplace accident injury, the employer at that workplace is liable for his PTD benefits. § 287.220.1, R.S.Mo. Simply put, the law of Missouri is “the employer is liable ... for the disability resulting from the last injury” *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 155 (Mo. App. 2014).

As the overwhelming substantial and competent evidence in this case was that Mr. Greer was permanently and totally disabled as an independent result of the 2006 crush injury, the law of Missouri is Employer is liable for his PTD benefits.

Prior to the 2006 crush injury, Mr. Greer worked for Employer full-time, even overtime, performing a physically demanding job. Despite pain and problems with his neck, back, and right shoulder due to preexisting injuries and illnesses, he fulfilled all work responsibilities (Tr. 38-40). Conversely, *after* the 2006 injury, Mr. Greer attempted to return to work but could not due to an inability to stand for long periods of time, use his foot to drive the forklift, or meet his job's lifting requirements (Tr. 57-61).

Ultimately, *this* injury caused Mr. Greer to leave his job due to constant pain and a limited range of motion in his foot (Tr. 61-62). But for the 2006 injury to his foot, he would have continued working for Employer through retirement. Although the previous injuries to his neck, back, and right shoulder were a hindrance and obstacle to employment, Mr. Greer was able to do his job until the crush injury.

Now, after the crush injury, Mr. Greer is unable to work at all. *Supra* at 17-19. As a direct result of that injury, he needs to elevate his leg throughout the day. *Both* vocational experts agreed that the need to rest and elevate his leg alone, considering no other injuries, would cause him to be unemployable in the open labor market (Tr. 758-59, 2778).

Thus, Mr. Greer is permanently and totally disabled from the February 2006 crush injury alone. The law of Missouri is Employer is liable for Mr. Greer's PTD benefits beginning February 4, 2011 and continuing for the rest of his life.

2. The SIF is liable for Mr. Greer's PTD benefits.

Regardless of whether Employer is liable for the PTD benefits to which Mr. Greer is entitled, the SIF also is liable for them. The evidence below was Mr. Greer is permanently and totally disabled equally due to the *combination* of the primary injury and preexisting disabilities, activating the SIF's liability.

The Court of Appeals' decision in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007), outlines the basis for prevailing against the SIF on a PTD claim. First, *some* disability from the last injury alone must be determined. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003). Then, it must be determined that the claimant is permanently and totally disabled, but not necessarily from that last injury. *Id.* The question is whether an employer in the usual course of business reasonably would be expected to hire the claimant in his present physical condition and expect him to perform work for which he is hired. *Knisley*, 211 S.W.3d at 635.

Even under the ALJ and Commission's findings, Mr. Greer readily met these tests. His primary injury occurred on February 23, 2006. In its ruling, the ALJ found, and the Commission affirmed, that he already had preexisting disabilities of 25% for his cervical spine (L.F. 42-43; Appx. A24-25). It found he suffered an additional PPD of 27.5% for his left foot for the primary injury (L.F. 42; Appx. A24). In total, then, Mr. Greer suffered 67.7% PPD due to his primary and preexisting injuries, lasting 270.85 weeks (L.F. 42-43; Appx. A24-25). Thus, *this* is Mr. Greer's physical and mental condition if he attempts to return to work and seek full-time employment over other applicants.

Prior to the primary injury, Mr. Greer was incapable of performing his job without assistance and accommodation from colleagues (Tr. 29-40). Chronic pain and problems due to these longstanding physical injuries hampered his ability to lift, walk, stand, bend, stoop, kneel, and reach overhead (Tr. 29-40). He could not meet his job's basic requirements without help from others (Tr. 29-40). While that help narrowly allowed him to keep his job, he constantly feared losing his job and promotions (Tr. 29-40).

The ALJ found, and the Commission affirmed, that Mr. Greer suffered a compensable injury that arose out of and in the course of employment (L.F. 35-36; Appx. A17-18). Due to this injury, Mr. Greer suffered extreme pain, underwent surgery, and continues to require treatment (Tr. 107-18). He missed months of work and was physically incapable of returning to his job with Employer (Tr. 56-62). His already restricted physical condition worsened. The primary injury further aggravated his preexisting injuries, slowed him down, and made it more difficult to work due to pain and problems bending, stooping, standing, walking and lifting (Tr. 71-74). His pain and worries over his ability to support his family affected his mental state (Tr. 71-74).

Indeed, the ALJ and the Commission agreed Mr. Greer's preexisting injuries were so serious as to constitute a hindrance or obstacle to his employment or re-employment, such that the preexisting and primary injury disabilities combined to create a disability significantly greater than the simple sum, activating a "loading factor" under the Worker's Compensation Law, and the SIF bore liability for the benefits the ALJ and Commission Found (L.F. 25-26; Appx. A25-26).

The question involved in whether the SIF also must bear liability for Mr. Greer's *permanent and total disability* is whether, due to the combination of his primary injury and preexisting injuries and illnesses, would any employer reasonably hire him for full-time employment? *Knisely*, 211 S.W.3d at 635. The overwhelming weight of the substantial and competent evidence below says "no."

Mr. Greer experiences extreme, continued pain in his left foot that precludes him from standing throughout the day, walking long distances and performing many basic tasks. This further is hampered by his already limited ability to lift, stand, bend, walk, sit, and reach overhead. He testified, and the medical experts agreed, that, physically and mentally, he is unable to work 40 hours per week. His current functional abilities include a limited walking ability that requires him to rest and elevate his leg during the day. He cannot sit for long periods of time, he has pain and difficulty when reaching overhead, and he has a permanent lifting restriction due to his right shoulder injuries.

Dr. Berkin testified Mr. Greer is permanently and totally disabled due to the combination of his primary and preexisting injuries and illnesses. Mr. Dolan, the only vocational expert who met with Mr. Greer, found Mr. Greer totally unemployable.

The Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who were not impeached, and it may not base a finding on conjecture or opinion unsupported by the record. *Houston*, 133 S.W.3d at 179; *see also Corp v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo. banc 1960). The Commission may not substitute its opinion on the issue of causation (Greer's ability to obtain employment in the open labor market) for uncontradicted testimony of a qualified

expert. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Plainly, the overwhelming weight of the substantial and competent evidence below is such that, regardless of Employer's liability for Mr. Greer's PTD benefits, the SIF is liable for them. First, there was at least some disability from the 2006 crush injury, the last injury at issue in this case. Then, as the medical experts and the only vocational expert actually to have met Mr. Greer and followed his own manner of evaluation testified, with all the injuries combined, Mr. Greer is permanently and totally disabled. An employer in the usual course of business reasonably would not be expected to hire Mr. Greer in his present physical condition and expect him to perform work for which he is hired.

Simply put, Mr. Greer cannot work. The law of Missouri is he is permanently and totally disabled, entitling him to PTD benefits as a matter of law. The Commission erred in holding otherwise. This Court should reverse the Commission's decision and remand this case for an award of PTD benefits from Employer or the SIF.

Conclusion

This Court should reverse the Commission's decision and remand this case for an award of PTD benefits from Employer or the SIF.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that this brief contains 7,281 words.

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Certificate of Service

I hereby certify that, on February 17, 2015, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Appellant and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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